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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable YVONNE GONZALEZ ROGERS, Judge

EPIC GAMES, INC.,)	
)	
Plaintiff,)	NO. C-20-5640 YGR
)	
vs.)	Monday, March 1, 2021
)	
APPLE, INC.,)	Oakland, California
)	
)	FURTHER CASE MANAGEMENT
)	CONFERENCE
Defendant.)	
_____)	

REPORTER'S TRANSCRIPT OF ZOOM PROCEEDINGS

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TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

Monday, March 1, 2021

9:30 a.m.

P R O C E E D I N G S

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THE COURT: Good morning, everyone. Let's go ahead and call your case.

THE CLERK: Calling Civil Action 20-5640 Epic Games, Inc. versus Apple, Inc.
Counsel, please state your appearances.

MS. FORREST: Good morning, Your Honor. This is Katherine Forrest for plaintiff Epic.

MR. BORNSTEIN: Good morning. Gary Bornstein also for Epic Games.

MS. MOYE: Good morning, Your Honor. Veronica Moya for Apple.

MR. DOREN: Good morning, Your Honor. Richard Doren for Apple.

THE COURT: Good morning.

All right. Ms. Stone, you have something to read.

THE CLERK: All right.

This Court is participating in a pilot program approved by the Judicial Council to study the practice of live streaming audio of civil proceedings.

Under the pilot guidelines, with the parties' consent, a judge may allow audio of certain civil proceedings to be live streamed to the Court's YouTube channel where it will be

1 accessible to the public. The parties to this proceeding have
2 consented to audio of the proceeding being live streamed to
3 the Court's YouTube channel.

4 To help ensure the audio is clear, please speak into your
5 microphones, mute your microphone when not speaking, and limit
6 background noises.

7 Thank you.

8 **THE COURT:** Thank you.

9 All right. When I originally set this, I thought perhaps
10 I was going to have all of the cases against Apple on the
11 platform. We were going to do some coordinating. That's not
12 necessary given the changes that the Court made in terms of
13 scheduling, which is why I vacated the hearings -- the Case
14 Management hearings in the other two Apple cases.

15 So today we are going to focus on getting ready for the
16 bench trial. As I indicated, I received your emails on Friday
17 evening or late afternoon. Appreciate that. Gave me lots to
18 think about over the weekend. And I also have received some
19 additional information from our Court staff here. So, let me
20 tell you where I'm coming out on this.

21 I understand that Apple wants and is committed to a fully
22 in-person trial to the fullest extent possible and they would
23 prefer a date later if that means that we can't have it in
24 May. Epic Games wants to have it in May as their first and
25 foremost priority, but they would prefer not to do it in

1 person.

2 I had -- when I talked to you all informally before, I
3 told you that I might be able to give you a couple of days in
4 person, which would make it hybrid, which has its own pros and
5 cons, but it turns out that our Court staff thinks that by May
6 I should be able to give you a fully in-person trial.

7 And given some of the considerations, which we will go
8 through, what I would be willing to do is have longer days. I
9 will move my criminal calendars so that I can give you five
10 days a week as opposed to four.

11 I understand that there are risks, so let's talk about
12 some of that.

13 The reality is, is that given the allegations that Epic
14 Games has brought against Apple, and the significance of this
15 case, as I reflected on the various issues, it fundamentally
16 occurred to me, or really what is driving this is, that these
17 allegations in this case is so significant it warrants the
18 best that the judiciary has to give. And the best is in
19 person. And that is because credibility matters. You're
20 going to have experts who have diametrically opposed views of
21 what's going on. We are going to have people from Apple
22 probably come in and say they've got to do what they have to
23 do and people from Epic who say absolutely not, you are
24 constraining competition.

25 When someone walks into the United States courthouse

1 through the courtroom doors and onto that stand, and they have
2 to stand and raise their right hand in a court of law, it
3 gives them pause. It makes them twice -- think twice about
4 lying or stretching. That's really different from sitting in
5 the comfort of your house or the comfort of your office, and
6 Cross-Examination is different in person.

7 A deposition shows us that it's possible; we do it all the
8 time. But we all know, as trial attorneys and as judges, we
9 all know that a deposition does not take the place of a
10 courtroom. So, the best that the judiciary has to offer is in
11 person. And I think that I can give it to you, and so that's
12 what I am going to do.

13 That being said, I am not going to, and I will be quite
14 generous with requests for people to appear remotely if
15 necessary for health considerations. I've been in touch with
16 Judge Albright down in Texas. Actually, just this morning an
17 article came out about his jury trials down there. And he's
18 going to confer with me later this week. He is making at
19 least the lawyers take daily COVID tests to make sure that
20 they are coming in without that. The parties are paying for
21 it, I believe, but I'm going to find out the specifics which
22 will help, I think, with the -- some of the concerns.

23 I do -- I do think that the health considerations are
24 important, but I also don't want it to be used as an excuse.
25 So if you tell me that someone cannot come for health

1 considerations, we better not find out that they have been on
2 vacation somewhere else, that they've -- you know, that they
3 are COVID deniers, I should say, in a way. We just -- I'm
4 asking you, as lawyers, to make sure that you investigate the
5 people who are telling you that they cannot show up.

6 I've got a case supposed to go to trial this summer, a
7 jury trial. And all of a sudden the -- one of the key people
8 in the trial is, you know, all over Facebook denying that
9 COVID-19 even exists, that is, that the problem is even there.

10 So, lots of people have different views. What I won't
11 allow is for someone to want to avoid the in-person
12 cross-examination by claiming a health concern, and then we
13 find out that that health concern is not genuine. If I find
14 that out, then, you know, I will consider striking the entire
15 testimony of that person. I won't be lied to.

16 Does that make sense? Do you all agree with that
17 approach?

18 **MS. FORREST:** Certainly, Your Honor, in terms of the
19 way in which witnesses should be handled and always should be
20 truth-telling and forthcoming with the Court as to the
21 realities of the situation.

22 We very much appreciate the Court's maintaining the
23 May 3rd date. We will abide by the Court's determination
24 here. We know that the Court has carefully considered our
25 concerns that we previously raised, so we won't go through

1 them again here right now. May 3rd is the most important
2 aspects of this for us.

3 **THE COURT:** Ms. Forrest, I will say, Epic Games has
4 lots of law firms that are local that are representing them.
5 You've got local counsel, Winston & Strawn and Fenwick both
6 represent Epic Games. They have local offices. To the extent
7 that you feel like you've got support staff, I'm sure that
8 these other law firms can give you local support staff.

9 Cravath and Epic, you know, you have considerable
10 resources. There are ways to do this in a way that maintains
11 the safety of individuals. And the reason, you know -- I
12 understand that people may have to quarantine when they go
13 home, but even that can be dealt with in terms of extra
14 resources.

15 Plus, you are all asking for five weeks. I told you
16 three. So add your two weeks to my three, and you get your
17 five. You know, I think that -- look, I have a lot of respect
18 for trial lawyers. Because sometimes you have to pick up and
19 leave and sometimes you leave for months your families.

20 A four- to five-week trial is, in the big scheme of
21 things, you know, is not the longest trials we do. I've done
22 four- to five-month trials. So it's not as if it -- it kind
23 of just comes with the nature of the practice. So, that's why
24 I left big firm law because I couldn't leave my kids with a
25 spouse who was always traveling. I couldn't do it anymore.

1 So that's, you know, that's part of why you get paid the big
2 bucks, so to speak.

3 **MS. FORREST:** Your Honor, I won't repeat because I
4 know that Your Honor has carefully considered our views. But
5 please understand that it has nothing to do with really the
6 convenience of the counsel. We understand, as trial lawyers,
7 and we try cases all over the country, that we are prepared to
8 do what's necessary. These are unusual times with unusual
9 issues associated with them. We are fully prepared to
10 resource ourselves appropriately and to try this case on
11 May 3rd in your courtroom.

12 **THE COURT:** Okay.

13 **MS. MOYE:** Your Honor, Veronica Moya for Apple.

14 I just want to reiterate our thanks for your careful
15 consideration of the issues and your decision on that.

16 Apple has had to do multiple jury trials during this
17 pandemic -- some in Texas -- and has come up with careful
18 protocols that we are confident will ensure everyone's safety.

19 I just wanted to be sure that you understood that we, of
20 course, are sensitive to safety and health concerns. We, too,
21 have a team that's located all over the country with, you
22 know, members from DC, from Texas, from Los Angeles. And so
23 we are just as concerned about health and safety as Epic is.
24 It's just that we are confident that we can have a safe and
25 healthy proceeding in part based on our experience during this

1 pandemic.

2 **THE COURT:** I asked you to meet and confer on some of
3 those proposed protocols. I am happy to order them.

4 And I would say the other thing is, you know, my intent is
5 to have very few people in the courtroom at any one time. It
6 may be different people over different days. But, you know,
7 we'll have the witness, the Court, I have to figure out what
8 Court staff I need to have in the courtroom because I expect
9 that most everything that we will be doing in terms of
10 documents, et cetera, will be electronic. So -- and then, you
11 know, at most, two to three people on the side, and that's it.
12 That would be the extent of the people in the courtroom for
13 any given day of proceeding.

14 I think those numbers will help immeasurably to keep
15 everyone safe. Like I said, I've -- Judge Albright has agreed
16 to chat with me later this week and share with me the
17 protocols he is using that he thinks is helpful.

18 Now, again, this is all tentative. I am telling you what
19 our people are hopeful that we are going to be able to achieve
20 by May. But we look at the numbers on a weekly basis. Right
21 now we have authorized criminal jury trials to proceed. So, I
22 wanted to give you that information so that you could start
23 planning.

24 **MS. FORREST:** Your Honor, may I just ask a logistical
25 question in terms of how Your Honor has done this?

1 As you know from our emails on this topic where we laid
2 out the Epic concerns about in-person proceedings, one of the
3 issues is whether or not the witnesses will be testifying with
4 masks or without masks.

5 With your -- in your experience, Your Honor, how would
6 that be likely to work?

7 **THE COURT:** Different judges have done it different
8 ways. I haven't had -- I mean, I haven't felt compelled to
9 have an in-person hearing yet. By the time I get to you, I
10 will have already had a criminal hybrid proceeding. Right now
11 I am just doing pleas and sentencings in person, and we have
12 used masks for those.

13 But the courtrooms are outfitted with shields. So there
14 are shields everywhere which, I think, helps. And then I know
15 that people have tried to use the masks that are see-through
16 so that you can see expressions, which I think will be
17 helpful.

18 The witnesses will be far away from all of you when they
19 are testifying. And by May, I should be fully vaccinated, so
20 I would be the person who is closest to that individual. So,
21 you know, I think, again, this is reason to let you know now
22 is because we have two months to figure out what is best
23 practice.

24 **MS. MOYE:** Your Honor, our experience has been that
25 it is safe and workable to do witness testimony without masks.

1 We have used plexiglass shields and, of course, now we are
2 having just a bench trial where there are fewer people in the
3 courtroom and there would be a lot of distance between the
4 parties.

5 So we think we can come up with a protocol that would
6 allow a safe proceeding where witnesses can speak clearly
7 without masks. And we are happy to go over that protocol with
8 Epic's counsel, to meet and confer with them about it.

9 **MS. FORREST:** Well, one thing I just -- I don't know
10 that we have to resolve that particular issue at this point.
11 I had wanted to just get the Court's guidance at this point,
12 if the Court had any. It may be to be determined.

13 I think from our perspective, indoor, unmasked testimony
14 could provide -- present some very significant health
15 concerns, but I think the Court has now laid out the
16 plexiglass, clear masks. I think that this is one of those
17 issues that we can put a pin in, so to speak, and revisit as
18 we get closer to the trial proceeding itself. I think that we
19 now have the direction, Your Honor, thank you very much, for
20 where it will be, and we will then set up the appropriate
21 precautions to preserve as much health and safety around that.

22 **THE COURT:** So my plan would be -- so the May 3rd
23 date is confirmed. What we are still trying to work on is the
24 precise format. If for some -- you know, worst case scenario
25 it's a full bench trial by Zoom, worst case scenario, but it

1 will happen March (sic) 3rd.

2 **MS. FORREST:** May 3rd, Your Honor?

3 **THE COURT:** May 3rd. Did I say something else?

4 **MS. FORREST:** I think you said March 3 the last time,
5 but we knew what you meant.

6 **THE COURT:** I'm not starting in two days. May 3rd.

7 Like I said, because I would like to plan for it being as
8 compact as possible, I will change my trial day. So we will
9 go from 8:00 to 10:00, 20-minute break, 10:20 to 12:20 with a
10 40-minute break, and then 1:00 to 3:00.

11 That will give me a few extra hours in the afternoon if
12 there's something I have to absolutely do for some other case.
13 As all of you know, but maybe not members of the public,
14 federal judges, our hundreds of cases do not go away while we
15 are in trial. That's a great thing about being a state court
16 judge, try a case and that's the only thing I had to do.
17 Nothing else. So, not so as a federal court judge.

18 The findings of fact and conclusions of law that are due
19 in a month or so, April 7th, what I would like you to do is
20 the following: I do this when I use jury instructions.

21 If what you will do is have just a one-page caption, the
22 title with your signature blocks that says attached hereto are
23 the proposed findings of facts and conclusions of law, and
24 then the attachments. If you will do it just in a Word
25 document, no pleading pages or anything, and then make sure to

1 send it to us electronically. That will just make it so much
2 faster for me to reconfigure it for my own purposes.

3 Okay?

4 **MR. DOREN:** Your Honor, in terms of format for the
5 Word document, is something with -- like an outline form or
6 with paragraphs as opposed to a table as you might see with a
7 summary judgment motion? I just want to make sure we do the
8 format that is useful.

9 **THE COURT:** What I want, Mr. Doren, is I want
10 things -- every paragraph numbered, so that if we need to talk
11 about issues, I can just say, you know, number 75 of 120 or
12 whatever it is, and everybody knows where to go to.

13 If you look at Docket 18-5712, *California versus Bernhardt*
14 Docket number 177, that's a sample of something that
15 doesn't -- the paragraphs aren't numbered, but it will give
16 you a pretty good concept.

17 **MR. DOREN:** Thank you.

18 **THE COURT:** If you want to include some table in
19 advance that -- you know, that would help me navigate it,
20 that's always appreciated.

21 So, findings 1 through 52 relate to the Breach of
22 Contract; 53 to 3,000 relate to the Antitrust -- anyhow, if
23 there's some way to make it more accessible to me, that would
24 be helpful.

25 With respect to those proposed findings of fact, each fact

1 shall include the witness and/or document that you believe
2 proves the fact. Again, that helps me navigate and understand
3 where all of the testimony is coming from.

4 With respect to the conclusions of law, those need to --
5 you need to make sure you do those by claim for brevity. Not
6 that you all have done things that are brief, but to the
7 extent that something rises or falls with something else, just
8 say so and then cross-reference the ones that you've already
9 done.

10 Within seven days of the bench trial being finished,
11 before your trial briefs are done, within seven days
12 thereafter, I'm going to ask you for a redline version of the
13 proposed findings of fact indicating what was actually proved
14 and the record references. And then to the extent you're
15 making any changes on the conclusions of law that are
16 corollary to those findings of fact, then those would be
17 redlined as well.

18 I will let you know that I will start writing before I get
19 your final briefing. I'm not -- and in fact -- well, we'll
20 see how it goes to a 3:00 o'clock day. When I do bench
21 trials, I usually finish at 1:30, do what I have to do and
22 then I start writing. Otherwise I can't get my orders out
23 quickly enough. It is these kinds of things that help me
24 navigate and help me be able to start writing.

25 Let's see. Under all circumstances we will be using Zoom

1 because we still have people who need to be participating
2 remotely, whether it's Court staff. And I think it also helps
3 for purposes of document management.

4 I expect there will be at least, you know, one person who
5 can't testify because of health concerns, so I want to make
6 sure that we have all of the technology in place.

7 So, again, I think if you all can meet and confer and try
8 to figure out a third-party vendor that can help you with all
9 of the documents, that would be helpful for everybody, and
10 especially for things like impeachment. And that way, we are
11 not -- we're not exchanging documents in the courtroom that
12 everybody is touching, et cetera.

13 **MS. FORREST:** Your Honor, we began to meet and confer
14 on that in the latter part of last week and have made some
15 progress on that issue.

16 **THE COURT:** Great.

17 So I went through my standing order on bench trials. And
18 there are a number of things that I don't think you need to
19 do, so I'm going to relieve you of the obligations of my
20 standing order. That is the other point that I need to be
21 clear on in case -- so that there is no confusion.

22 While Zoom has allowed us to provide access over and
23 beyond what we have ever done, we're doing this by video and
24 everybody can see the video who wants to see it. Looks like
25 we've got, you know, 65 people watching in addition to 11

1 participating. I cannot and, in fact, am not allowed to do
2 that by the Administrative Office of the Courts for purposes
3 of evidentiary hearings, including trials.

4 So everybody understands that public access will be audio
5 only. All right? And perhaps the U.S. Courts will change
6 their mind over time, but right now that's the only option
7 that's available.

8 **MS. FORREST:** Your Honor, can I just ask just a
9 question on that: Whether we will nonetheless be able to have
10 a corporate representative in the room during the trial
11 testimony?

12 **THE COURT:** I'm going to give you an allocation. I
13 think the number is three. Use it however you want to.

14 **MS. FORREST:** That would include lawyers and
15 representatives?

16 **THE COURT:** Right.

17 **MS. FORREST:** Thank you.

18 **THE COURT:** I might be able to increase that to four,
19 but given the concerns that everybody has, the fewer number of
20 people in the courtroom the better.

21 **MR. DOREN:** Just one observation, Your Honor. As I
22 think about it, the parties may want to have a hot seat
23 operator in the courtroom who could be distant from the
24 lawyers but will facilitate the electronic use of documents.

25 So from out here, that may weigh in favor of four, but

1 obviously whatever the Court orders.

2 **THE COURT:** Well, if you are both sharing and both
3 agreeing, I'll take the hit myself.

4 **MS. FORREST:** I'm sure, Your Honor, we'll be able to
5 meet and confer on that issue as well and perhaps come up with
6 just one person who could fill that role for both of us.

7 **THE COURT:** And that person doesn't need to be close.
8 They can be the furthest person away since it's all just
9 remote.

10 Okay. Under my standing order with respect to trials,
11 Section 2 a. requires that you give me a brief description of
12 the claims and defenses, et cetera. You are relieved. I
13 don't need that. I already have your 167 pages. At some
14 point I'm going to give you a great quote on brevity, but
15 we're not there yet.

16 2 b. ii. requires plain and concise statement of disputed
17 factual issues. I don't need that.

18 2 b. i. does provide for undisputed facts. I would ask
19 you to meet and confer on undisputed facts. There has to be
20 things that we do not have to argue about or take evidence on.
21 So that should be a separate filing. You all can agree what
22 doesn't have to be proved here and is just stipulated.

23 2 c., disputed legal issues. I don't need that. What I
24 need is what I've already told you to do.

25 2 d., I don't want to know about any discovery issues.

1 I'm assuming by the time we get there we have what we have.

2 2 f., no Motions in Limine.

3 2 g., it's not applicable.

4 2 h., trial alternatives; not necessary to go through
5 that.

6 3 f., jury instructions does not apply.

7 3 g., joint statement of the case does not apply.

8 3 h., jury selection does not apply.

9 3 i., proposed verdict forms does not apply.

10 And then in terms of exhibits, 6 i. does not apply.

11 My first inclination is always to have -- I need one set.

12 Well, what are we looking at in terms of the exhibits?

13 Does anybody have a ballpark of the numbers of documents?

14 **MS. FORREST:** Actually, Your Honor, this raises one
15 point that we wanted to address. I think we are still
16 assessing that very quickly because we've got a -- I think it
17 is the way we count back, it's a March 24th submission of the
18 trial exhibits to each other.

19 One thing that would help, and counsel, Ms. Moye, and I
20 this morning were having a meet and confer on just this, is
21 getting an earlier date lined up for the exchange of witness
22 lists, at least tentative witness lists that precedes the date
23 that we submit it to the Court so we can be certain to have
24 the right trial exhibits lined up and not have to have a whole
25 slew of things that are on the list just in case somebody gets

1 called that we're not expecting, that we've guessed wrong.

2 So we are trying to work that out, but we would very much
3 like to have something in advance of March 24th be a date when
4 we exchange tentative trial witness lists.

5 **MS. MOYE:** Yes, Your Honor, we have discussed that
6 issue --

7 **THE COURT:** Ms. Moye, your volume is pretty low. So
8 you are going to need to sit closer to your computer.

9 **MS. MOYE:** Okay. Is this better, Your Honor?

10 **THE COURT:** It is. Thank you.

11 **MS. MOYE:** Thank you.

12 Yes, we did discuss that issue this morning just before
13 the -- our meeting here today. And we need to consider it
14 further with the client.

15 Of course, we want to do everything we can to narrow the
16 number of exhibits that are presented to the Court. It's just
17 that we need to give that thought of whether we would be able
18 to exchange lists earlier further consideration. So we will
19 continue to talk to Epic's counsel about that.

20 **THE COURT:** Here's your problem. Until I get those
21 lists, you don't know how much time you have. So, if you want
22 to know if this is a two-week, three-week, or five-week trial,
23 you better try to get those things done so that I can look at
24 it and tell you what I'm going to give you. You won't
25 necessarily get what you want.

1 I mean, just remember, our rule of thumb generally is,
2 that lawyers ask for twice the amount of time that judges want
3 to give 'em. So I know you are at four to five weeks, you
4 know I'm at two to three weeks. But I don't like to do things
5 in a vacuum. So I need to see those lists and I need to see
6 what it is you think they are going to testify to and how much
7 time you think you are going to need.

8 So the sooner you can do it, the better for everyone.

9 **MS. FORREST:** Your Honor, I think that that --

10 **MS. MOYE:** Thank you, Your Honor, yes.

11 **MS. FORREST:** It might assist the parties just to
12 have Your Honor give us a date certain when we can give you
13 exactly that information.

14 There are not that many witnesses I think that we are all
15 choosing from frankly. I don't know that this exercise is
16 particularly difficult. We may need to have some leeway in
17 case one person swaps out or in, but we would certainly be
18 prepared to give you that information as soon as the Court
19 would like.

20 The 12th of March, as a for instance, as a date to shoot
21 at so we can get that very important direction that Your Honor
22 has indicated in terms of trial duration, so we can plan
23 presentations, written directs, what should go in with
24 written, what might not, you know, be amenable to a written
25 process, et cetera.

1 **MS. MOYE:** Well, your Honor, we're not prepared to
2 agree to expedite the current schedule in that regard --

3 **THE COURT:** I am going to expedite it. So what's the
4 best you can do?

5 **MS. MOYE:** I believe certainly not March 12th is
6 doable. I think we would need at least another week after
7 that. I would like the opportunity just to confer with the
8 client if that's possible.

9 Again, this is an issue that was raised for the first time
10 shortly before our conference here today.

11 **MR. DOREN:** Your Honor, if I may? Two thoughts.

12 First of all, as the defendant, of course, who we will
13 call will depend in part on who Epic calls, so perhaps the
14 staging of this.

15 And second of all, expert discovery is still ongoing. The
16 rebuttal experts' reports will be issued on March 15, and then
17 expert depositions will take place over the next two weeks.
18 So, those also may factor into who will ultimately be called
19 at trial.

20 So, the timing towards later in the month, I think, would
21 facilitate this and then also a staging.

22 **MS. FORREST:** Your Honor, one point on that.

23 And March 24th is the date for the exchange of the trial
24 exhibits. So if this is to have the ability to assist us with
25 having a realistic and narrowed list, something in advance of

1 March 24th, I think, would be certainly very helpful in that
2 regard. Otherwise, we end up putting things on the list that
3 really would never have to go on the list and end up having
4 discussions that nobody ever has to have.

5 In terms of the experts, the experts have put in their
6 affirmative reports. We could wait until March 16th. That's
7 certainly, I think, still an advancement over the timing and
8 people will, I'm sure, proceed with deliberate speed to read
9 these reports as quickly as possible to see if it adjusts our
10 initial impressions.

11 But we know who the experts are. That's for sure. Those
12 lists don't change.

13 **THE COURT:** I can't imagine at this point that -- are
14 you suggesting you are not going to put your experts on,
15 Mr. Doren?

16 **MR. DOREN:** No, Your Honor.

17 **THE COURT:** Well, you don't have time to replace
18 them, so --

19 **MR. DOREN:** Your Honor, specifically, I mean, we just
20 learned -- I believe we just learned that there will be no new
21 experts on rebuttal. So that's helpful information. We did
22 not know that before just now.

23 And, again, Your Honor, for example, as to what documents
24 go on the exhibit list, we as defendants have to cover a
25 broader potential range of issues. Epic knows what their case

1 is and knows what they want to put on the list.

2 Again, I'm just suggesting that a staging where Epic lets
3 us know who they are going to call, and then we can add from a
4 more educated perspective who we will be calling as defendants
5 to respond.

6 **THE COURT:** All right. Let's do this: These are
7 tentative lists, right? I'm going to give you the leeway to
8 adjust them later, but you better have a good reason why.

9 So, plaintiff, you exchange your list on March 12th.
10 Defense, exchange their list March 16th. And then plaintiff,
11 you go ahead and respond by March 18th in case they bring
12 someone in that you didn't anticipate for your list. So --

13 **MS. FORREST:** Thank you, Your Honor. That works very
14 well.

15 **MR. DOREN:** Thank you, Your Honor.

16 **THE COURT:** Okay.

17 I like to have a physical copy. I'm still old school. I
18 still like physical copies. It allows me to go through the
19 totality of what you have very quickly, and I get tired of
20 doing things on screens. So, I am going to need at least one
21 physical copy of the exhibits.

22 We'll need a thumb drive or something and then we'll load
23 everything electronically. Everybody else in the court can
24 do -- can have it electronically. At the end of it all,
25 whatever is admitted, just to be super clear, we will just

1 have you give us, again, a thumb drive with the culled out --
2 I mean, if it is easy enough for us to do it, that's fine.
3 But it may be easier for you to just send us a thumb drive.

4 Yes, Ms. Stone, I don't know if you want 50 binders.

5 **THE CLERK:** We have to keep a paper copy that goes as
6 a set if it gets appealed. We still keep a paper set.

7 **THE COURT:** Okay. Then maybe they can provide us the
8 paper set. That way -- I don't know that you want -- well,
9 did you really want 50 binders? That's why I'm saying, if
10 they provide it after-the-fact and everything else is
11 electronic.

12 You are not going to be giving it to them, to the
13 witnesses.

14 **THE CLERK:** Right. What the Court, as exhibits,
15 always keep a paper copy in case it is appealed it goes to the
16 Ninth Circuit. I mean that's been the protocol in the Clerk's
17 office to have a paper copy.

18 **THE COURT:** All right.

19 **MS. FORREST:** Would it assist, Your Honor, if what we
20 did was give a paper copy of the received exhibits at the
21 conclusion of the bench trial? That way you don't have 50
22 binders in case it turns out only 20 had been admitted?

23 **THE COURT:** You know what would be helpful?

24 Let's have you -- so, every day -- well, to the extent
25 that you have -- let's have you, the day after the testimony

1 if I have admitted something, bring the paper copy in and hand
2 it to Ms. Stone. Those are the admitted exhibits.

3 That way she's got a paper copy every day or the next day
4 and then she'll just hang on to those as they get admitted.

5 **THE CLERK:** Okay.

6 **MS. FORREST:** We can give it to her with tab numbers
7 that are three-hole punched to be inserted into the binder
8 directly.

9 **THE COURT:** I don't know that she -- do you want them
10 in a binder or do you --

11 **THE CLERK:** They can be loose. I will figure it out.
12 If I need a binder, we have them.

13 **THE COURT:** Okay.

14 I will require deposition transcripts. The way that works
15 is, about a week before the trial starts, you will need to
16 make arrangements with Ms. Stone to bring those transcripts
17 in. And, again, everything is changing. So she'll let you
18 know the day.

19 The transcripts will need to be brought in with -- I
20 require that you provide a list or a chart of everything that
21 you are bringing. And that chart has to have a place for your
22 person who is delivering to initial and Ms. Stone to initial
23 received. That way I confirm that you believe you brought it
24 to us and your person has initialed that, and she has
25 explicitly agreed that we have it.

1 I require that because I had instances, and it happens in
2 trial, where someone says -- I haven't had it recently because
3 that's why I have this protocol -- but way back when, Your
4 Honor, we brought the transcript. I say, no, you didn't.
5 Ms. Stone says I didn't have it, or my state court clerk, and
6 we can't find the deposition transcript. So this is what I do
7 to make sure that I actually have what you say I have. Okay?
8 So that, you will have to do as well.

9 Let me see if there is anything else.

10 Do you have any questions?

11 **MS. FORREST:** One point that I just wanted to
12 clarify, not so much a question.

13 But when I made my comment earlier about everybody knows
14 their expert witnesses, that is certainly true. We may have a
15 rebuttal expert that has been added because of the opening of
16 Apple's, but we will be able to take care of that with a list,
17 but I wanted the record to be clear on that.

18 And to report also that we have continued discussions on
19 the possibility of some written direct. I don't know if Your
20 Honor is now thinking that we should not proceed further with
21 that in light of the live proceeding in your courtroom?

22 **THE COURT:** No, I think that you should, but you also
23 have to get that to me early enough for me to read. Because
24 having a Cross-Examination without having had the opportunity
25 to read the Direct Examination is kind of pointless -- not

1 pointless, but just not as effective.

2 **MS. FORREST:** Your Honor, it could well be that it's
3 some substantial portions of some expert Direct Examination,
4 so they might be complex and lengthy. What would your
5 preference be in terms of timing for that if we do end up
6 reaching such an agreement?

7 As I said, we are still continuing that conversation, but
8 it has been productive so far.

9 **THE COURT:** Couple of weeks.

10 **MS. FORREST:** The middle of April, Your Honor? I can
11 take a look at the calendar.

12 **THE COURT:** Again, it depends on how much you're
13 sending.

14 **MS. FORREST:** April 20th, Your Honor?

15 **THE COURT:** That would be great.

16 **MS. FORREST:** And we can tell Your Honor in advance
17 perhaps what we will be sending. And if you decide to adjust
18 the date in any way, we can take Your Honor's direction at
19 that time.

20 **THE COURT:** Okay.

21 **MS. MOYE:** Your Honor, just to be clear, we have had
22 a number of discussions and the parties have agreed that for
23 fact witnesses, their entire testimony should be live, both
24 Direct and Cross-Examination.

25 **THE COURT:** That's fine. It's really the expert --

1 **MS. MOYE:** Correct.

2 **THE COURT:** -- testimony that is pretty complicated
3 and is, you know, it works -- I think it works well to have
4 it, the Direct, at least, portions of it done in writing.

5 **MS. MOYE:** That's exactly what we were thinking. We
6 are continuing to discuss how to make that most effective and
7 efficient for the Court.

8 So it may be that we end up posing some kind of hybrid
9 model where there is a little bit of Direct, the balance of it
10 being written and then live Cross. But we are continuing
11 those conversations trying to make it the most workable as
12 possible.

13 **THE COURT:** Okay.

14 The other thing that I do is, I do require you to give
15 each other -- it sounds like you are all cooperating so it
16 shouldn't be an issue. It has been an issue in other trials,
17 which is why it's a standard order of mine.

18 I do require that you give each other 24 hours advance
19 notice of someone's testimony. For Monday testimony, you are
20 required to do it by noon on Saturday.

21 People need to prepare for witnesses. And I've had
22 instances, again early on, where a lawyer came in and said,
23 Your Honor, I told her, we were standing at the elevator, that
24 I was going to bring in this witness. And I suggest you were
25 probably right, you probably did tell her, but she's in trial

1 and she probably didn't pay any attention.

2 So, I require it be in writing. And I've had some
3 lawyers, when I used to say one day, well, 10:00 o'clock is
4 the day before. That doesn't work for me either. So now I
5 say 24 hours.

6 **MS. MOYE:** Understood, Your Honor. We believe it
7 should be at least 24 hours and would like to, you know, have
8 the opportunity to confer with Epic about the possibility of
9 it even being 48. Just, again --

10 **THE COURT:** I will order 48 if you all agree on 48,
11 but I am not going to order it.

12 **MS. MOYE:** Understood.

13 **MS. FORREST:** Your Honor, along those lines, I think
14 we understood that when we are planning the presentation at
15 trial, we should plan to have like expert followed by like
16 expert. So, for instance, a primary economist would be
17 followed by somebody speaking on the same topic from the other
18 side so that I think I understood Your Honor as wanting those
19 sort of joined up and paired.

20 Is that correct?

21 **THE COURT:** Yes.

22 **MS. MOYE:** Your Honor, just for clarity on this, what
23 I understood is that you wanted experts to testify by subject
24 matter, by the same subject matters.

25 **THE COURT:** All I'm saying is, however you present --

1 and Epic goes first. So you have -- I don't know how you
2 divided up your experts and the topics upon which they are
3 going to opine. But I expect that for every expert and on
4 every topic on which they are going to opine, the other side
5 is going to have a counter expert. I want that testimony back
6 to back.

7 **MS. MOYE:** Understood. Understood, Your Honor.

8 In our situation, there are experts that cover multiple
9 topics. And so this is, again, another issue I think we will
10 have to meet and confer with Epic about to try to come to some
11 agreement on how to stage the expert testimony that, again,
12 makes it effective for the Court.

13 I understand the goal. It's just that one of Epic's
14 expert, for example, covers kind of the whole waterfront. So
15 if he testifies to all of his opinions, then we'd have five
16 experts behind him testifying to all their opinions. So it is
17 just something we need to confer further about and come up
18 with a proposal to submit to the Court.

19 **MS. FORREST:** I think that we are certainly open to
20 conferring. The issue is that we have one primary economist
21 and then another economist who will be very short. And Apple
22 has multiple economists who cover the same material.

23 We would prefer to put our economist on. It's no surprise
24 that we would like to start him and then finish him because a
25 lot of these pieces, particularly market definition, things

1 like that, they flow one to the other. And he tells a story
2 then about competitive effects that are based upon how the
3 market is defined.

4 So putting the story together is holistic. We can do this
5 in perhaps multiple ways, but we would like to put the expert
6 on, let's just say in the morning and have him end by the end
7 of the day or however long he takes, and then his
8 Cross-Examination to follow and however Your Honor would like
9 to structure it after that.

10 **MS. MOYE:** And, you know, again, this is something
11 we'll talk further about, but what we would like the
12 opportunity for the Court to consider is, does it want to hear
13 our expert testimony on market definition, for example, and
14 then move to expert testimony on other issues?

15 So to the extent one expert covers multiple issues, they
16 may have to take the stand multiple times. The question is
17 what would be most --

18 **THE COURT:** The problem with that is, Ms. Moye, the
19 problem with that is if we are live and this expert doesn't
20 live in the Bay Area, and I looked at the expert reports this
21 morning, and it doesn't look like they -- it doesn't look like
22 many of them live in the Bay Area, I'm not going to have that
23 person sitting around and wait --

24 **MS. MOYE:** Absolutely.

25 **THE COURT:** -- multiple days to finish up their

1 testimony.

2 So if it makes it more complicated for me, so be it. I'm
3 just telling you what would be most helpful for me in terms of
4 understanding the experts' opinions.

5 The other thing I will say is that, you know, remember,
6 experts, much of their testimony is hearsay. That is -- at
7 least with respect to the factual basis. So they don't get to
8 testify on the hearsay until the facts are in the record.
9 Don't forget that. And I am a stickler about that issue.

10 If the facts aren't coming in or do not come in, then
11 entire opinions could be invalidated or perhaps opinions don't
12 come in. So it is important to remember that while experts
13 can talk and their opinions can be based on hearsay, the
14 underlying factual material actually needs to be in the
15 record.

16 **MS. MOYE:** Understood.

17 **THE COURT:** Okay.

18 If you're going to want daily transcripts, which I suspect
19 you might, we are going to need to know that and the order
20 will have the contact information. Because typically our
21 court reporters have to hire somebody to help them turn out
22 those dailies and especially if we are going until
23 3:00 o'clock every day.

24 **MR. DOREN:** I am guessing it's fair to say we will
25 want dailies, Your Honor.

1 **THE COURT:** I figured as much, Mr. Doren.

2 **MS. FORREST:** Your Honor, one other point that will,
3 I think, hopefully narrow the case, at least a little bit is,
4 that we do plan on making a stipulation that I will continue
5 to work with Apple's counsel on related to the Breach of
6 Contract claim where we will essentially stipulate that claim
7 away in terms of -- from my client. So we will work on how
8 that will -- how that will come into the Court and to the
9 extent to which it impacts the proof.

10 **THE COURT:** I commend you for that. As I was
11 thinking about this trial, it seemed to me that that, even
12 though your client might not want to stipulate, that the
13 Breach of Contract was actually pretty straightforward.

14 **MS. MOYE:** Yes, Your Honor --

15 **THE COURT:** Maybe the affirmative defenses is not,
16 but on a, you know -- I mean the terms aren't unambiguous. It
17 seems to be straightforward.

18 **MS. FORREST:** Correct, Your Honor.

19 **MS. MOYE:** Yes, Your Honor. Of course we appreciate
20 Epic's willingness to stipulate to the breach. Our view is
21 that that stipulation is unlikely to have any impact on the
22 presentation of evidence in the case. Because the facts
23 related to the breach are related to many of the other claims,
24 including the unclean hands issue.

25 So we don't expect that there will be much of an

1 evidentiary impact from that stipulation, but we do appreciate
2 the willingness to admit that they breached.

3 **THE COURT:** Except that then I don't have to write
4 about it.

5 **MS. MOYE:** Correct.

6 **THE COURT:** So it impacts me.

7 **MS. MOYE:** Correct, Your Honor.

8 **THE COURT:** Okay. Let's see.

9 The tentative lists of witnesses, I do want you to file
10 those and you can identify them as tentative until the final
11 ones are due.

12 With the final one coming in 3/18, if they are substantive
13 enough, that is, if you are identifying -- well, if you will
14 do this, identify the scope of what you think they are going
15 to testify to, and what you anticipate in terms of time,
16 Apple, when you file your list on the 16th, if you will also
17 file a response to the plaintiff's in terms of how much time
18 you think your Cross is going to take with their witnesses.

19 And then on the 18th, Ms. Forrest, when you file your
20 response, if you will take Apple's list and give me the Cross.

21 **MS. FORREST:** I can certainly --

22 **THE COURT:** I will need one more filing on the Epic's
23 list from the 18th.

24 You can do that by the 22nd, Ms. Moye?

25 **MS. MOYE:** Yes, Your Honor.

1 **THE COURT:** Okay. Then you said your exhibit lists
2 are due to each other on the 24th?

3 **MS. FORREST:** I think counting back, Your Honor, from
4 the conference and the trial book, yes, that's the date that I
5 have.

6 **MR. DOREN:** That's the date we have as well.

7 **THE COURT:** All right.

8 I go into trial on the 29th. So why don't we go ahead and
9 if you're available on March 26th, we can have another trial
10 conference. By then I'll have had an opportunity to look at
11 your lists and we will be approximately a month away, so I
12 will be able to confirm more details.

13 **MS. FORREST:** Very well. That works.

14 **MR. DOREN:** Your Honor, for purposes of the witness
15 lists, one other question.

16 Will it be the Court's practice that if Epic were to call
17 an Apple witness in their case-in-chief, that that witness
18 would appear once for all purposes?

19 **THE COURT:** You know, I think that that would be --
20 wouldn't that be your preference?

21 **MR. DOREN:** Yes, Your Honor.

22 **THE COURT:** Okay. Look, you will find that I will
23 give you some flexibility if there's some reason -- if there's
24 some reason to do it differently. But I would expect that it
25 will probably be easier for everyone if that person just

1 testifies one time.

2 **MR. DOREN:** Thank you, Your Honor.

3 **THE COURT:** Okay.

4 Friday, March 26th, 9:30 works?

5 **MS. MOYE:** Yes, Your Honor.

6 **MS. FORREST:** Yes.

7 **THE COURT:** Okay.

8 There are some other miscellaneous things you may find in
9 the Order, but just read the Order. It's not really something
10 that's objectionable in any way. It's court protocol.

11 **MR. BORNSTEIN:** Would Your Honor like to receive a
12 statement seven days in advance of the March 26th conference
13 per the usual --

14 **THE COURT:** My view is that we will discuss trial
15 logistics, trial time. If you want to submit an agenda a
16 couple of days in advance, that's fine.

17 **MR. BORNSTEIN:** Very good. Thank you.

18 **THE COURT:** Okay. Anything else you want to do
19 today?

20 **MS. FORREST:** Nothing more from Epic, Your Honor.

21 **MS. MOYE:** Nothing more from Apple, Your Honor.

22 **THE COURT:** All right.

23 And I will ask that you meet and confer on those
24 protocols. To the extent that you have ideas that you would
25 like me to order or to consider, please feel free to reach out

1 and let me know so that we can make some progress here over
2 the next month even though we are not going to have a formal
3 hearing. Okay?

4 **MS. FORREST:** Yes.

5 **MS. MOYE:** Thank you, Your Honor.

6 **THE COURT:** All right. Everybody stay safe. Thank
7 you very much. We are adjourned.

8 **MR. DOREN:** Thank you, Your Honor.

9 **MS. FORREST:** Thank you.

10 **MR. BORNSTEIN:** Thank you.

11
12 (Proceedings concluded at 10:27 a.m.)
13

14 **CERTIFICATE OF REPORTER**

15 I, Diane E. Skillman, Official Reporter for the
16 United States Court, Northern District of California, hereby
17 certify that the foregoing is a correct transcript from the
18 record of proceedings in the above-entitled matter.
19

20 

21 DIANE E. SKILLMAN, CSR 4909, RPR, FCRR

22 Monday, March 1, 2021
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